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Before the  
DEPARTMENT OF TRANSPORTATION  
Docket Clerk, Room Plaza 401  
400 7<sup>th</sup> Street, S.W.  
Washington, D.C. 20590  
ATTN: DOCKET NO. FAA-1998-4758 -31

**COMMENTS OF THE**  
**AMERICAN CIVIL LIBERTIES UNION**  
**ON THE**  
**SECURITY PROGRAMS OF FOREIGN AIR CARRIERS**  
**NOTICE OF PROPOSED RULEMAKING**  
63 Fed. Reg. 64764 (November 23, 1998)

**March 23, 1999**

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The American Civil Liberties Union (ACLU) submits the following comments to the Department of Transportation Docket Clerk on the Security Programs of Foreign Air Carriers Notice of Proposed Rulemaking, 63 Fed. Reg. 64764 (November 23, 1998), Docket No. FAA-19984758 ("NPRM"). The ACLU is a non-profit, non-partisan, private organization with over 275,000 members dedicated to preserving the liberties embodied in the Bill of Rights.

We submit these comments in an effort to protect the privacy and equal treatment rights enjoyed by air passengers who will be affected by the proposed rule. U.S. law prohibits foreign carriers from engaging in unreasonable discrimination against passengers. 49 U.S.C. Section 413 10. Compliance with this prohibition ought to be furthered through the security programs adopted under this proposed rule. These comments do not address the full range of concerns the ACLU has with respect to the protection of air passengers' civil liberties.

## **BACKGROUND**

The ACLU has a consistent record of working to protect the civil liberties of air passengers in the context of security measures applied against them. In 1991, the ACLU filed a class action lawsuit against Pan Am World Airways for subjecting passengers of Middle Eastern origin to heightened security measures based on their race and national origin. In 1995, the ACLU was represented at the Workshop on New Technologies for Passenger Screening convened by the Committee on Aviation Security, Panel on Passenger Screening, for the National Research Council. In 1997, the ACLU was represented on the Civil Liberties Advisory Panel on passenger profiling to the White House Commission of Aviation Safety and Security chaired by Vice-President Gore ("Gore Commission").

The NPRM would effectively require foreign air carriers operating to and from airports in the United States to adhere to the identical security measures to which the FAA requires U.S. carriers serving the same airports to adhere. The proposed rule would implement Section 322 of the Antiterrorism and Effective Death Penalty Act, which mandates identical measures. The mandate covers both flights departing the U.S. and the last leg of flights bound for the U.S. The NPRM also indicates that, "Special attention will be paid [by the FAA] to more complex measures, such as profiling."

The proposed rule will impose U.S. security regimes on foreign carriers (and in some cases on foreign governments charged with implementing security measures.) In many cases, these carriers serve or originate in countries with poor human rights records, institutionalized discrimination, and little regard for privacy rights. We believe that the U.S. security regime imposed ought to include U.S. values of non-discrimination and privacy. After all, many of the people who will be subjected to foreign carriers' security measures will be American citizens.

In addition to "identical measures," the proposed rule contemplates that foreign carriers would adopt additional measures: "A foreign air carrier is not considered to be in violation of this requirement if its security program exceeds the security measures required of U.S. air carriers serving the same airport." This statement raises a number of concerns and questions. What would the Federal Aviation Administration do if a foreign air carrier decided to "exceed the security measures required of U.S. carriers" by identifying by race, religion, gender, sexual orientation or national origin the passengers to whom it would employ heightened security measures? What if

the foreign carrier chose to search only the African-American or Arab-American passengers? How would the Department of Transportation or the FAA learn that this is happening? How would the foreign air carrier know that such a discriminatory policy violates U.S. law?

We pose these questions because neither the NPRM nor the proposed rule, nor the regulation it would amend includes any measures to protect passengers' civil liberties. Absent from the NPRM and the proposed rule is any discussion of anti-discrimination and pro-privacy measures required of U.S. carriers, measures recommended by the White House Commission on Aviation Safety and Security in 1997, and measures recommended by the American Civil Liberties Union in comments on other proposed regulations in 1997. Rather than ignore these problems, we believe the FAA should adopt rules to deal with them.

Our concerns about the security programs of foreign air carriers, like our concerns about the security programs of domestic carriers, can be summarized as follows:

- ◆ passengers should be treated with respect and should not be detained, questioned and searched as if they are potential criminals, unless articulable facts specific to them indicate that they may commit a criminal act;
- ◆ no passenger should be singled out for heightened security measures on the basis of their perceived or actual race, religion, national origin, gender, sexual orientation, political opinion, or based on proxies for such characteristics;
- ◆ passengers have a privacy interest in, and the right to control use of, the personal information about them that is gathered by air carriers;
- ◆ air traffic transit points should not be turned into government check points where government agents conduct searches of person and property for generalized law enforcement or surveillance purposes.

Under the regulations now in place, the FAA must approve of the security plan of every foreign carrier. We believe that the government, through the certification process, has an obligation to ensure that it does not put its imprimatur on discriminatory or privacy-invasive practices by certifying or re-certifying the security plans of foreign carriers that engage in such practices.

## **NON-DISCRIMINATION SAFEGUARDS**

The NPRM fails to address the potential for the discriminatory impact of foreign carriers' security measures. The White House Commission on Aviation Safety and Security recommended that air carriers be barred from singling out passengers for heightened security measures on the basis of their race, religion, national origin, gender, or other constitutionally-protected characteristics. It also recommended that factors to be considered for elements of choosing passengers for heightened security measures should be based on measurable, verifiable data indicating that the factors chosen are reasonable predictors of risk, not stereotypes or generalizations. We believe that the FAA should impose these restrictions on foreign carriers.

Foreign carriers are under an obligation to refrain from discriminating against their passengers. 49 U.S.C. Section 413 10. They must be explicitly directed to ensure that any security program they adopt is in compliance with this non-discrimination requirement.

This is not a mere theoretical concern. For example, the profile used by El Al Airlines, Israel's national carrier, reportedly discriminates based on race. According to a September 6, 1996 NBC news report and an August 6, 1996 article in the Washington Post, one of the elements of the El Al profile is "young, dark-skinned male" or "'Middle Eastern-looking' men with Western passports."

Each foreign carrier should be required to include in its security program a commitment to refrain from subjecting passengers to heightened security measures based on protected characteristics. Suggested language: *No security screening policy, practice or procedure shall be employed that has the purpose or effect of subjecting passengers to heightened security measures based in whole or in part on the passenger's actual or perceived race, national origin, religion, political opinion, gender, or sexual orientation.* It should be made clear, however, that when foreign carrier receives an FAA security directive, or other specific, credible evidence based on facts establishing a clear, immediate threat that can be particularized with respect to a carrier and/or an aircraft, and includes a description of the person causing the threat, heightened security measures with respect to persons fitting that description are permissible.

In addition, the FAA should ensure that security screening personnel trained to conduct security screening in a respectful, courteous, non-discriminatory and minimally-intrusive manner according to written, verifiable standards. To ensure that such awareness and training are effective, foreign carriers should be required to have in place a program to identify security screening personnel who are the subjects of repeated passenger complaints about discriminatory, abusive, or overly-intrusive security screening.

## **PRIVACY PROTECTIONS**

The NPRM fails to address the potential threat to privacy posed by foreign carriers' security measures. This failure extends to informational privacy and to imaging technology.

The FAA has established performance standards for security screening equipment. It should also establish privacy standards for such equipment, particularly, for imaging devices used on passengers themselves. Some of the technology now available is capable of projecting a detailed image of a passenger's naked body underneath their clothing in the search for explosives and weapons. The image is so clear that even the passenger's navel is apparent. Some body scanning devices would project images of conditions many passengers regard as intensely private, including evidence of mastectomies, colostomy appliances, penile implant devices, artificial limbs and other prostheses. We first called for privacy standards for security screening equipment over two years ago. Any standards should apply both to U.S. carriers and to foreign carriers to ensure that foreign airlines do not employ on Americans body scanners that exceed the privacy standards established by the FAA.

Some security screeners have taken it upon themselves to question passengers about personal matters, even in the absence of any evidence the passenger constitutes a threat to the air carrier. Where did you go? Why did you go there? With whom did you visit? What do you do for a living? Passenger privacy standards in this area should also be established. Passengers should be advised whether they can be denied boarding if they refuse to respond to any question.

Passengers should have control over the personal information about them collected by the air carriers, whether foreign or domestic. This includes, but is not limited to, data about the places to which the passenger has traveled in the past. The White House Commission on Aviation Safety and Security recommended that restrictions be placed on the maintenance of records about passengers, and that strict limitations on the dissemination of such records be developed. We believe that the FAA should ensure that such restrictions likewise apply to foreign carriers. While some might argue this an unnecessary intrusion on the business practices of foreign carriers, it is certainly no less intrusive than the European Union's Data Protection Directive, which gives consumers control over their own personal data, and with which the U.S. Government is struggling to help industry comply.

## **MONITORING ALLEGATIONS OF ABUSE**

For almost two years, the ACLU has urged the DOT to establish an independent entity that would monitor abuses in aviation security such as discriminatory searches. The Civil Liberties Advisory Panel to the Gore Commission made a similar recommendation. No such panel has been established. While the Department of Justice (DOJ) did do a study, the study was not independent. The DOJ helped create the profiling system it was later asked to evaluate. Moreover, the DOJ report did not involve actual testing of the system on passengers. It is essential to rooting out discriminatory effects that allegations of discriminatory searches be collected and analyzed. Thus far, the DOT's efforts in this area have been inadequate.

This independent administrative entity should have the power to receive and investigate complaints of discriminatory or other inappropriate implementation of security measures, whether by domestic or foreign carriers. Furthermore, the DOT should track and report passenger complaints of inappropriate, discriminatory, or overly intrusive implementation of security standards -- as it does for on-time performance -- so that passengers know which airlines, domestic and foreign, commit security-related abuses, and so carriers can re-train problem agents. Some of the complaints ACLU has received are attached. Given the fact that foreign carriers will be permitted to adopt security measures in excess of those required of U.S. carriers, the necessity of independent monitoring becomes all the more apparent.

## **CONCLUSION**

Any new requirement that foreign air carriers to comply with the same security standards as U.S. carriers should also include safeguards addressing non-discrimination and privacy concerns. Airline security programs that fail to comply with privacy and non-discrimination requirements -- like programs that fail to meet security requirements -- should not be certified. To certify as compliant a racially discriminatory security screening program of a foreign carrier would put the imprimatur of the U.S. government on that program. Finally, an independent administrative entity should be established to receive complaints about, and monitor implementation of, aviation security measures -- including those of foreign carriers that, "exceed measures required of U.S. carriers" -- to ensure that they do not violate the civil liberties of the traveling public. END



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## WHAT PASSENGERS ARE SAYING ABOUT FOREIGN AIRLINES' SECURITY SCREENING

*[These accounts are excerpted from reports of abusive or discriminatory aviation security screening reported to the ACLU on its website, [www.aclu.org](http://www.aclu.org) and from documents collected by other interested organizations:]*

[X.X.] Dulles Airport 12/96 KLM

I am writing on behalf of [my] 88-year old grandfather who carries an Iranian passport. He has lived in Germany for 25 years. Upon showing his passport to the ticket agent, he was asked to wait in line to have all his baggage checked. The line was extremely long and we had to wait for the appropriate personnel to arrive. The line was in public view of all the passengers. Everyone in the line was obviously of Middle Eastern origin. Both security personnel were extremely rude. . . All of his possessions were on display for passersby. The underwear of an 88 year old man on display for everyone. The look of lost dignity on the face of my grandfather was enough to send me over the edge.

[X.X.] Miami 7/97 Lufthansa

I was ordered to follow the security agent with my 3 suitcases and my two daughters (ages 4 and 9) to a nearby table. Each of our suitcases were placed on the table in the plain view of other passengers waiting to check in as the security person went through every item in our suitcases. . . . It was the most humiliating experience of my life to be singled out and searched while other passengers watched. It was also very difficult to explain to my 4-year old daughter why we were subjected to such a humiliating action as no logical explanation can justify the reason for *[sic]* such a racist policy. They told me they had to search us because of my national origin. *U.S. Lawful Permanent Resident, citizen of Iran, daughters are U.S. citizens.*

M.S. Dulles Airport 10/96 Lufthansa

The Lufthansa agent at the ticket counter asked me what was my nationality. I told her that I was a Libyan citizen with a U.S. green card. . . . She then told me that my luggage would have to be searched. I told her that I have had no contact with Libya since I had moved to the U.S. in 1983. She responded that Lufthansa Airlines has a policy for searching the luggage of all Libyan, Iraqi, Sudanese, Cuban, and Iranian nationals. Airport security then proceeded to open my luggage and hand search my bags item by item. The search was done in the terminal and all of my personal belongings were completely exposed to all the other passengers nearby without any regard to my privacy. The identical experience occurred for a second time [12/96].

<sup>1</sup> Information included is incomplete and excerpted. Each excerpt begins with the complainant's initials followed by place of the incident, the date and the foreign carrier. "[X.X.]" indicates that complainant asked that personally identifiable information be redacted. Grammar and spelling are corrected in many cases. Italicized information was added by ACLU.



[X.X.]            Houston                    4/97                    KLM

I took my mother to the Houston Intercontinental Airport **KLM** counter. . . . [S]he was told that EVERYONE with FINAL destination Damascus must undergo a baggage search. This was an FAA directive and she must comply. The search was done in an open area, and the search person took every single personal belonging from her bags and placed on the table. . . . [I]t was the most humiliating experience my mother has ever experienced and she had a nervous breakdown. *Mother is U.S. citizen with Syrian last name.*

[X.X.]            Dulles Airport                    10/96                    Lufthansa

My husband . . . and I are both citizens of the United States . . . [and] we also happen to be of Syrian heritage. As we were waiting in the long line of passengers at the Lufthansa check-in counter, we were picked out of line by airport security personnel. Airport security explained that they had approached us because we are traveling to Syria. Yet we were the only ones picked out of the huge line of passengers who were also traveling to Syria. Airport security then proceeded to extensively search our four pieces of luggage for one half hour. It is clear that Lufthansa discriminated against us and violated our privacy because of our national origin. *U.S. citizens, of Syrian heritage.*

**L.F.**                    Newark Airport                    08/96                    El Al

[From a 3rd party's summary]: L.F. was visiting family in Haifa, Israel. Ms. F's uncle is a **thirty**-year veteran of the Israeli Knesset and her sister-in-law is Jewish. [Ms. F.] was pulled aside by El Al security, and the person seeing her off was not allowed near her. Ms. F. was questioned for about one hour, and some of the questions she was asked included: what were the origins of her parents? how she could afford to attend an expensive school such as Yale? what she did before attending Yale? whether she attended Sunday school? Her passport and ticket were taken from her and she was left alone for a long time. No one from El Al returned until her flight had taken off and then someone told her that Newark Airport did not have proper equipment to examine her luggage; that El Al Airlines did not have time to go through her luggage; and that L.F. was a security risk and could not board the aircraft. El Al traded her ticket in and placed her on a TWA plane out of JFK the next day. Ms. F. offered to open up all her luggage, submit to a body search and/or dog sniff but El Al refused. *U.S. citizen, father is Palestinian-American.* END